In the Supreme Court of the United States

OCTOBER TERM, 1964

No. 71

BEKINS MOVING & STORAGE COMPANY, PETITIONER

v.

DONALD JOHNSON

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF IDAHO

MEMORANDUM FOR THE INTERSTATE COMMERCE COMMISSION AS AMICUS CURIAE

This memorandum is submitted pursuant to the Court's request for the views of the Interstate Commerce Commission on the issues presented in the petition for a writ of certiorari.

STATEMENT

This case arises out of an action for damages instituted in a State court in Idaho by respondent Donald Johnson against petitioner Bekins Moving & Storage Company ("Bekins"). The trial judge awarded Johnson actual damages, rejecting the carrier's argument that its liability was limited by a tariff filed with the Interstate Commerce Commission pursuant

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to a released rates order, and the Supreme Court of Idaho affirmed. The pertinent facts, which were stipulated, are as follows.

Johnson contracted with Bekins to transport household goods from Highland Park, N.J., to Idaho State College at Pocatello (Pet. 31a). At the time of the execution of the bill of lading, Johnson requested and Bekins "promised and agreed to pack one of the items of household goods, a hi-fi set, in a barrel" (Pet. 31a). Johnson paid an additional charge of $8 for the protective packing service (Pet. 4), but the carrier "did not pack the hi-fi set in a barrel, and the same was transported * * * without packing of any kind, other than the use of ordinary pads and blankets" (Pet. 31a–32a). The hi-fi set was damaged in transit, and the amount of actual damages was stipulated to be $555 (Pet. 33a).

Bekins admitted responsibility for the loss, but contested the amount of damages, contending that its liability was limited to $15 by a tariff filed with the Interstate Commerce Commission and in effect at the time of the shipment (Pet. 32a, 33a). The tariff provided that unless the shipper declared the value of a shipment in writing on the bill of lading (and paid a higher rate)—which Johnson did not do—"the liability of the carrier for loss or damage * * * shall be released and limited to 30¢ per pound of the weight of the loss [*sic*] or damaged article" (Pet. 34a). The limitation on liability was deemed "to relate to all services undertaken by the carrier or its agents" (Pet. 35a).

The trial court awarded Johnson the stipulated actual damages (Pet. 18a–22a) and the Supreme Court of Idaho affirmed (Pet. 1a–15a, 389 P. 2d 109). The appellate court agreed with Bekins that the limitation-of-liability provisions of the tariff applied to "additional accessorial protective services," such as the packaging in a barrel contracted for here (Pet. 9a); and that "if, upon performance, the shipper sustains loss or damage, then * * * the carrier's liability [is] limited to the released value of 30 cents per pound, unless the shipper has declared a different value" (Pet. 7a). The court ruled, however, that the limitation-of-liability was not applicable to a loss caused by the carrier's "utter disregard of its covenant to perform" a specially requested protective service (Pet. 7a, 8a, 9a). The court ruled (Pet. 15a):

> This special covenant—for the protective packaging of [Johnson's] hi-fi set—which [Johnson] specifically requested and [Bekins] specifically agreed to perform upon receipt of an additional charge, is the precise ground upon which we affirm the decision of the trial court. * * * [I]f the carrier fails to perform its covenant and treats it as nonexistent, then it cannot limit its liability in the same manner as though it had performed, and the shipper is not bound by the terms of the covenant imposing limited liability.

ARGUMENT

Section 20(11) of the Interstate Commerce Act, 49 U.S.C. 20(11) (Pet. 23a–25a), provides that com-

mon carriers are permitted, when "expressly authorized or required by order of the Interstate Commerce Commission to establish and maintain rates dependent upon the value declared in writing by the shipper or agreed upon in writing as the released value of the property, in which case such declaration or agreement shall have no other effect than to limit liability and recovery to an amount not exceeding the value so declared or released".[1] The Commission has granted such authority to household goods carriers (Released Rates Order No. MC–362, Pet. 28a–30a), and the tariff involved here (No. 78B, MF–I.C.C. No. 90, Pet. 34a–35a) was admittedly based upon the Commission's order (Pet. 32a). The tariff states that as to "all services undertaken" by the carrier: "If shipper fails to declare the value of the entire shipment in writing upon the bill of lading, the liability of the carrier for loss or damage to any article carried or held in storage in transit pursuant to this tariff shall be released and limited to 30¢ per pound of the weight of the loss [*sic*] or damaged article."

Where Section 20(11) and the orders of the Commission made pursuant to the section apply, no agreement in derogation of them is valid. See *Southwestern Sugar Co.* v. *River Terminals Corp.*, 360 U.S. 411, 420, n. 9, and cases there cited. This is simply an application of the general rule that carriers may not lawfully enter into special contracts inconsistent with tariffs filed with the Commission and

[1] This section of the Act is made applicable to motor common carriers by 49 U.S.C. 319 (Pet. 26a–27a).

outside their standard bills of lading. *Missouri, K. & T. R. Co.* v. *Ward*, 244 U.S. 383; *Texas & P. R. Co.* v. *Leatherwood*, 250 U.S. 478. It is, moreover, clear that limitation-of-liability clauses apply to accessorial services such as packing in a barrel. See *Cleveland, C. C. & St. L. R. Co.* v. *Dettlebach*, 239 U.S. 588. The Commission would regard with the greatest concern any decision authorizing some form of collateral agreement departing from the limitation-of-liability provisions authorized by the motor carrier's tariff or the released rates order.

As we understand the opinion below, however, the Supreme Court of Idaho did not purport to give effect to any collateral agreement inconsistent with the tariff petitioner had filed with the Commission. It recognized that the Commission's released rates order applicable to household goods carriers was valid and binding upon the court and the parties before it (Pet. 7a). The court merely construed the limitation-of-liability provision as inapplicable where the carrier had wholly failed to perform a specially requested protective service, in this case providing special packing for the high-fidelity set. But it recognized that the limitation-of-liability provision applied to accessorial services; it indicated that, had petitioner damaged Johnson's hi-fi through negligent performance of its packing duties, the shipper's recovery would have been limited to 30¢ per pound, or $15 (Pet. 7a).

The exception which the court thus found implicit in the Commission's released rates order, as well as in the tariff filed by Bekins and the bill of lading used by the parties, was both narrow—applicable only where the carrier had made no attempt to perform a contracted-for protective service—and, we are inclined to believe, not unreasonable as an interpretation of the legitimate expectations of the parties.[2]

Except where the question "raises issues of transportation policy which ought to be considered by the Commission in the interest of a uniform and expert administration of the regulatory scheme laid down by [the] Act" (*United States* v. *Western Pac. R. Co.*, 352 U.S. 59, 65), "what construction shall be given a railroad tariff presents ordinarily a question of law

[2] Few guidelines have been developed in the lower courts in related contexts of statutory or contractual interpretation. A carrier would be liable for the actual loss if it were to convert the goods to its own use or if the loss flowed from a fraud of the carrier—and we assume that the same result would follow were the carrier deliberately to destroy the goods for no valid reason. See *Glickfeld* v. *Howard Van Lines*, 213 F. 2d 723, 727 (C.A. 9); *Dexter & Carpenter, Inc.* v. *Davis*, 281 Fed. 385, 388 (C.A. 4); *Moore* v. *Duncan*, 237 Fed. 780, 783-784 (C.A. 6); *Mitchell* v. *Union Pac. R. Co.*, 188 F. Supp. 869, 874 (S.D. Cal.). On the other hand, there is authority going both ways as to whether actual damages can be obtained where the carrier has been grossly or wantonly negligent. Compare *Bassett* v. *Chicago & N.W. Ry. Co.*, 168 Wis. 617, 171 N.W. 749 (limited liability provisions applied) with *Nashville, C. & St. L. Ry. Co.* v. *C. V. Truitt Co.*, 17 Ga. App. 236, 86 S.E. 421 (actual damages allowed).

which does not differ in character from those presented when the construction of any other document is in dispute"—*i.e.*, a typical judicial function like construction of a contract. *Great Northern Ry. Co.* v. *Merchants Elevator Co.*, 259 U.S. 285, 291. In the present case, the construction of the tariff does not involve an exercise "of discretion in technical matters" and does not require an "acquaintance with many intricate facts of transportation" (*ibid.*). We therefore think that interpretation of the limitation-of-liability provision in this case was properly undertaken by the State courts.

If other courts in future cases were to extend the very narrow exception created below in such a way as to threaten to dissipate the benefits in exchange for which the carriers offer reduced rates, the Commission might feel compelled to challenge the holdings and, perhaps, also to assert the necessity of prior recourse to its expert judgment in interpreting the tariffs. Similarly, if the present case involved a holding that a carrier and a shipper were free to supplement the provisions of a bill of lading in ways inconsistent with the tariff, we would believe that review by this Court would be necessary. But the decision below, as we read it, represents no more than a bona fide exercise of State court jurisdiction to decide a question of construction in a way which does not threaten the tariff approved by the Commission. We

therefore believe that there is no necessity for this Court to undertake review of the decision below in the absence of a conflict in decisions.

CONCLUSION

It is respectfully submitted that for the foregoing reasons the petition for a writ of certiorari should be denied.

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